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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 18

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY TO APPELLEE'S MOTION TO AFFIRM

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February 25, 1958

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., ET AL., *Appellants*, v. UNITED STATES OF AMERICA, *Appellee*.	No. 650

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY TO APPELLEE'S MOTION TO AFFIRM

On December 9, 1957, the appellants docketed this case in this Court and filed their Jurisdictional Statement. Prior to docketing Mr. Justice Harlan had granted a stay in which he stated that some aspects of the relief ordered by the District Court were "admittedly 'drastic' ".. (Appendix A).

On December 18, 1957, the Solicitor General advised the Clerk of this Court as follows:

> "Dear Mr. Fey:
>
> "The United States waives the right to file a motion to affirm in the above-entitled case."

On January 6, 1958, the Clerk of this Court advised the Solicitor General of this Court's "desire that the Solicitor General file a response stating the position of the Government in the above-entitled case."

The next day the Solicitor General made application for an extension of time, stating:

> "On January 6, 1958, the Solicitor General was informed by the Clerk that the Court desires the Government to file a response stating its position in this case. Since the Government's response may be in the form of a motion to affirm under Rule 16, this extension is requested in order to secure sufficient time for preparation and printing of such a motion, and to obviate any possible questions of timeliness."

On January 7, 1958, Mr. Justice Harlan signed an order extending the time for filing a motion to affirm to and including February 7, 1958, and counsel for appellants were so advised.

On February 6, 1958, the Solicitor General filed a motion to affirm and sent copies by mail to counsel for appellants which were received February 7th.

While we recognize that this Court has complete control of its own calendar, we submit that the Government is precluded from filing this Motion to Affirm, *first*, because the Solicitor General waived the right, and *second*, because a motion to affirm, which this Court knew had been waived, is not a "response stating [a] position". When the Solicitor General waived his right to file a motion to affirm, he, of course, did so with full information about and consideration of the entire record which has not yet been printed.

THE NATURE OF THE MOTION TO AFFIRM.

It is perfectly plain from a reading of the whole document that the Solicitor General is not stating its position with respect to the issues. The first six pages are a statement of fact which add nothing to that contained in the Jurisdictional Statement and contain some rather material inaccuracies:

(a) While Messrs. Norris and Wirtz had financial control of the Chicago Stadium, and arenas in Detroit and

St. Louis, prior to 1949 it did not use them for the promotion or exhibition of world championship boxing contests. Indeed, there was little boxing of any kind at any of these three stadia.

(b) Only in a most colloquial sense was the Garden a partner of Mike Jacobs. He or his corporation Twentieth Century Sporting Club was a lessee of the arena on certain Friday nights and arranged the broadcast and telecast of the Friday night fight wherever held, sponsored by Gillette.

(c) Messrs. Norris and Wirtz had nothing to do with the formulation of the plan for Joe Louis' retirement. When they acquired an interest it was in full bloom.

(d) The Government fails to tell this Court that when Jacobs surrendered the balance of the term of his lease he was sick unto death. Indeed, the actual agreement is signed only with a mark. There were no Wednesday night series instituted by him.

It is significant that the Solicitor General has not undertaken to discuss many of the points raised by the appellants relating to the trial and the hearings *sur* decree as are contained in their Jurisdictional Statement. The Solicitor General contents himself with summary statements of the "facts" without representative record citations. His discussion is based solely on the District Court's findings.

The Solicitor General's statement does not deny many specific statements of fact contained in the Jurisdictional Statements which clearly show error in the Court below, both as to liability and remedy. Some examples are as follows:

(a) Facts showing that divestiture of the Garden stock was punitive and unnecessary.

(b) That no championship fight had been conducted under anybody's promotion in the Detroit or St. Louis Arena during the 10 years prior to 1949.

(c) That it was Joe Louis and his advisers, and not Messrs. Norris and Wirtz, who conceived the round robin for a determination of the successor to Joe Louis.

(d) That Mike Jacobs had long prior to 1949 originated the Friday night weekly fight program sponsored by Gillette.

(e) That some of the championship fights in the weekly series were promoted by others than the defendants.

(f) That no putative promoter of championship fights had been excluded from promotion or from obtaining exclusive contracts with boxers.

(g) That the return bout provision in the contract with boxers was usual and inserted for the protection of the defending champion.

(h) That there were many arenas in the United States and in each section thereof in which championship boxing could be promoted and in fact was.

(i) That the bulk of the Garden stock held by Messrs. Norris and Wirtz was acquired before the beginning of the alleged conspiracy and the acquisition was in no part the purpose or result of any alleged violation of law.

(j) That the Garden stock held by Messrs. Norris and Wirtz was not used to further the purposes of the alleged conspiracy.

(k) That there was no charge of any law violation in connection with the conduct of non-championship fights.

(l) That the decree inflicts unnecessary injury on the majority of the activities in Madison Square Garden, which activities have no connection with boxing.

(m) That the effect of the decree will be to injure the public.

Finally, the Solicitor General does not deny that the relief granted is far in excess of that sought by the Government in the complaint which was before this Court in 348 U. S. 236.

THE PRIOR DECISION OF THIS COURT

At the outset it is necessary to understand what *United States* v. *International Boxing Club*, 348 U. S. 236, holds. Prior to that decision, decided January 31, 1955, and during the whole period complained of by the Government, it was the view of lawyers and judges generally throughout the country, including Judge Noonan of the Southern District of New York in this very case, that the Sherman Act did not apply to organized professional sports. In the 1955 decision a majority of this Court held, contrary to this view, that there was no immunity under the Sherman Act because the business the defendants were transacting was the promotion of professional world championship boxing contests and, second, that if as alleged, more than 25% of the revenue from championship boxing is derived from interstate operation through the sale of radio, television and motion picture rights, the defendants were subject to suit just as persons who conducted any other interstate business. That much and no more was held. There was no ruling as to what was the relevant market, or as to what facts would establish liability on the part of the defendants, or what would justify, even in the broadest discretion, the extreme type of relief here granted by the District Court. This present appeal presents important legal questions never decided by this Court in this or any other case.

REPLY TO ARGUMENT

I.

On the merits the Government defends the selection of the relevant market as championship boxing contests by relying completely upon the assertion that championship contests are not interchangeable with non-championship contests. We think the findings upon which this argument is predicated are clearly erroneous within the meaning of Rule 52-a of the Rules

of Civil Procedure and we submit that we have a right to present our case on that issue.

The sharp distinction between championship and non-championship fights which the District Court found does not exist. The differences depend upon the participants, the class or division, the location of the fight, the time of year, publicity and numerous other factors. Some non-championship fights have been more popular or have earned more money than some championship fights. There are many facets to the question of the market which require examination of the evidence and which preclude summary disposition. Among other things, the Government should certainly not be allowed in determining jurisdiction and liability to use one market of championship boxing contests and to exclude consideration of non-championship contests, and then, when molding a decree, to act on another market of professional boxing, including non-championship contests as to which consideration was denied in the trial on the merits.

II.

The rest of the motion is directed to an attempt to sustain certain provisions of the judgment, the Government erroneously stating that there are other [unspecified] provisions which appellants do not question. The theme of the argument is that the District Court's discretion should not be interfered with absent proof of abuse thereof. We later show that the District Court itself had grave doubts as to its exercise of that discretion.

1. Divestiture of Garden Stock

We repeat, the stock which Messrs. Norris and Wirtz acquired in Madison Square Garden Corporation was not acquired pursuant to the alleged conspiracy but its origin long antedated the alleged conspiracy's inception in 1949. The

stock was not used either to create the alleged conspiracy to restrain or monopolize or to carry out its purposes. In the absence of such proof we know of no precedent that justifies divestiture. Certainly we know of no case that justifies transferring possession and the principal incidents of ownership of appellants' stock to court appointed trustees, nor any principle which justifies diminution of appellants' income by the payment of trustees' fees and the accompanying host of attorneys' and accountants' applications.

2. Dissolution

The purpose of a decree in the Sherman Act proceedings is to remove the incidents of the restraint and to prevent future recurrence. We know of no case in this Court where the death sentence has been imposed in civil antitrust litigation and we certainly know of no case where the test of life or death is dependent upon the value of the assets of the defendant to be sentenced. We think it significant that even in the *Northern Securities* case (193 U. S. 197) the Statutory Court neither appointed a trustee nor ordered dissolution.

3. Compulsory Leasing of Arenas

It is of course elementary law that private property may not be confiscated under the guise of antitrust enforcement. That does not mean that conduct otherwise lawful may not be enjoined for a period of time in order to secure compliance with the law. Here if the Garden is forced to lease its arena to an applicant at what it believes, despite the wisdom of the District Judge fixing the rental, is an inadequate rental, that loss can never be recouped. Furthermore, there can be no recoupment of loss sustained by the Garden if the championship fight mandatorily ordered by the Court is competitive with and injurious to the Garden's own series of fights which are permitted to it under the decree. This would be a plain deprivation of property.

As the decree now stands, if the management of Madison Square Garden wants to have a flower show on the night of Friday, March 14th, and John Jones, a promoter of professional prize fights, desires to conduct a professional world championship boxing contest on the same night, a judge of the Federal Court will decide to which of those contenders the Garden will be leased and if he decides that it shall be leased to John Jones, it will fix the rent. In other words, the District Court would be weighing and controlling not only boxing but the other 94% of the activities of the Garden totally unrelated to boxing. No wonder the District Court itself manifested many qualms about the validity of this and other provisions of the decree, saying (S. M. 879):

> "No, I would give them the stay on everything for this reason: this case presents a case of novel impression. I believe I am right on the law I have applied here, but there are a number of principles of law which we are applying here for the first time. I do not know that there has ever been any provision, for instance, just to pick out one of them, that might be considered a minor provision—I do not know that there is any provision for compulsory leasing. I never recall any in antitrust. The nearest to it would be a compulsory royalty license, reasonable royalty license on a patent or a copyright, but I do not know any that has gone that far. I do not know any that has gone as far as No. 3."

And again, (S. M. 880):

> ". . . but above and beyond that there are a number of novel points of law that I do not think you will find any decision on, that I know there are no decisions on, and I feel that although I am right in my decision, I am right in my findings and in my conclusions and in the remedies I applied, I do not possess infallibility, and other men smarter than me may differ with me. . . ."

4. Restrictions Not Confined to Championship Contests

The Solicitor General concedes that paragraphs 3, 4, 5 and 15 of the Judgment enjoined the appellants from conduct relating to non-championship boxing contests and attempts to defend them on the ground that restrictions on any form of professional boxing are necessary as the activities may eventually affect championship fights. Be that as it may, the significant fact is that when appellants repeatedly sought to offer proof, and to make argument that the relevant market for antitrust purposes was all professional boxing contests, the District Court would have none of it and created at the behest of the Government a small narrow market in which it sought to prove monopoly by mathematics. That was no inadvertent procedure, for if the relevant market was all professional boxing, the undisputed fact show that there was no monopoly and no unreasonable restraint.

5. Option to the Garden to Give Up Championship Boxing Contests

In the complaint of March 17, 1952, amended by stipulation of January 7, 1954, fixing May 15, 1953 as the "cut off" date, which complaint is the only one before this Court (we print the prayer for relief as Appendix B because the record herein has not been printed), there is no suggestion in the relief requested that Messrs. Norris and Wirtz should be required to sever their relations with Madison Square Garden Corporation as officers, directors or stockholders.

In the form of decree tendered by the Government immediate divestiture of the Garden stock owned by Messrs. Norris and Wirtz was proposed. At the hearing on the form of relief the Court was emphatic in saying that it would never sign such a decree. (S. M. 88) Nevertheless counsel for appellants was quick to say that if the Court ordered otherwise the appellants would ask the option of the Garden giving up championship boxing (S. M. 128, May 20, 1957).

Thus the matter stood throughout the hearings until June 20, 1957, when the Court (S. M. 633) announced that it had changed its mind and in effect was going to prohibit Messrs. Norris and Wirtz from acting in any capacity for the Garden and was going to compel them to sell their stock. The seriousness of this to the Garden was far beyond professional championship boxing, for Messrs. Norris and Wirtz had in large part become responsible for the creation and promotion of numerous activities which are necessary to fill the Garden on as many nights as possible. Only 6% of the nights of the year are occupied by boxing and an infinitesimal part by championship boxing. When the Court indicated that it was considering reversing its previously announced stand, the directors of the Garden forthwith met and adopted a resolution requesting that it be given an option to renounce the promotion of professional championship boxing contests for such period as the Court might deem appropriate rather than have Messrs. Norris and Wirtz compelled to sell their stock and to resign as directors and officers. This the Court refused on the ground of irrelevance. Option provisions in decrees are common and its refusal was arbitrary and an abuse of discretion.

In addition to this option the appellants have consistently contended that if Messrs. Norris and Wirtz are to be required to disassociate themselves from one of Chicago Stadium or Madison Square Garden, they should have the right to choose which they would keep and which they would give up. In this connection, the statement on page 13 of the motion that the defendants "now" control the principal arenas in Chicago, Detroit and St. Louis is simply contrary to the evidence. They have no interest in Detroit and the St. Louis Stadium is not used for boxing. The possibility of such undocumented statements influencing a court is a compelling reason against summary procedure.

There are many other important questions which will be presented to the Court on a hearing of this appeal. We have sought merely to discuss the points raised by the Government's present motion and to point out a few other points which, even without the printed record before us, indicate clearly that this appeal should be heard.

CONCLUSION

It appears that this case involves substantial questions of antitrust law which have not previously been decided by this Court and of which the appellants are entitled to a review. It is respectfully suggested that the Solicitor General's original determination and decision not to file a motion to affirm was a sound and correct one. We submit that the motion to affirm should be denied and probable jurisdiction noted.

Respectfully submitted,

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February 25, 1958

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No.—— October Term, 1957.

International Boxing Club of New York, Inc., et al., Appellants,

v.

United States of America.

On Application for a Stay of Judgment of the United States District Court for the Southern District of New York.

[October 29, 1957.]

Mr. Justice Harlan, Circuit Justice.

The fact that this is the first Government antitrust case involving professional sports to be reviewed by this Court after trial on the merits and the admittedly "drastic" character of some aspects of the relief granted by the District Court combine to lead me to the conclusion that the appellants' application for a stay of the judgment below, pending appeal, should be granted in substantial part. Indeed, the Government concedes, with commendable frankness, that such parts of the judgment "which would result in substantial and irreparable injury [to appellants] in the event of a reversal" and "which could substantially affect the property interests of the appellants" should not be put into effect pending review. Accepting the premises on which the Government suggests this application should be decided, cf. *Breswick & Co.* v. *United States*, 75 S. Ct. 912, I shall make the following disposition of the application for a stay, to become effective upon the expiration of the stay heretofore granted by the District

Court and to continue until this Court's final determination of appellants' pending appeal:

(1) As to paragraphs "8," "9," "10," "11," "13," "14," "15," "16," "17," "18," "19," "20," "21," and "22" of the judgment, the application for a stay is granted. To this relief the Government has no objection.

(2) As to paragraphs "3," "5," "6," and "7" of the judgment, the application for a stay is granted to the extent that such provisions relate to the exercise of subsisting contract rights acquired by any of the appellants prior to March 8, 1957, the date on which the District Court filed its opinion holding that the Sherman Act had been violated. Although the Government opposes any stay of these provisions, I consider that this limited stay is in keeping with the formula which the Government has recognized should govern the disposition of this application.

(3) In all other respects the application for a stay is denied.

An appropriate order may be submitted to me for signature on or before November 4, 1957.

APPENDIX B

[PRAYER FOR RELIEF IN COMPLAINT, filed March 17, 1952 as amended by stipulation and which was before this Court in 348 U. S. 236].

WHEREFORE, plaintiff prays:

1. That the Court adjudge and decree that the defendants and each of them have combined and conspired to restrain and to monopolize, and have restrained and monopolized, interstate and foreign trade and commerce, as hereinbefore alleged, in violation of Sections 1 and 2 of the Sherman Act, and that defendants be enjoined and restrained from continuing such violations or committing other violations of like character or effect.

2. That the Court adjudge and decree that the defendants have used the agreements referred to in paragraph 26 of this complaint and their financial and contractual interests in and control over arenas and organizations engaged in the promotion of professional championship boxing contests, as hereinabove described, unlawfully in instituting, effectuating and maintaining the aforesaid violations of Sections 1 and 2 of the Sherman Act.

3. That the Court order and direct the cancellation and termination of the agreements referred to in paragraph 26 of this complaint, and that the defendants be enjoined and restrained from enforcing such agreements and from entering into any agreements of like character or effect.

4. That defendant Garden be enjoined from leasing its arena exclusively for professional championship boxing contests to any promoter of such contests, and from discriminating

against any promoter desiring to lease said arena for a professional championship boxing contest.

5. That defendants Norris and Wirtz be ordered and directed to cause the arenas listed in paragraph 24 of this complaint, as long as any of such arenas are controlled by these defendants, directly or indirectly, to refrain from leasing their facilities exclusively for professional championship boxing contests to any promoter of such contests, and to refrain from discriminating against any promoter desiring to lease any of such facilities for a professional championship boxing contest.

6. That the Court enter such further orders regarding the aforesaid interests in and control over arenas and organizations engaged in the promotion of professional championship boxing contests as may be necessary and appropriate in order to dissipate the effects of the violations alleged herein and to restore free and open competition in the trade and commerce in the promotion, exhibition, broadcasting, telecasting, and motion picture production and distribution of professional championship boxing contests.

7. That pursuant to Section 5 of the Sherman Act, an order be made and entered herein requiring such of the defendants as are not within this District to be brought before the Court in this proceeding as parties defendant, and directing the Marshals of the Districts in which they severally reside or are found to serve the summons upon them.

8. That the plaintiff have such other, further and different relief as the nature of the case may require and the Court may deem just and proper in the premises.

9. That the plaintiff recover its taxable costs.